A

INDAH DESA SAUJANA CORPORATION SDN BHD & ORS

v.

B

JAMES FOONG CHENG YUEN & ANOR

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
MOHD GHAZALI YUSOFF JCA
LOW HOP BING JCA
C [CIVIL APPEAL NO: W-01-2A-2006]
5 DECEMBER 2007

CONSTITUTIONAL LAW: *Attorney General - Representation - Civil suit against High Court judge - Whether judge sued in personal or official*
D *capacity - Whether judge performed duties in relation to execution proceedings properly - Allegations of corruption - Whether substantiated - Whether Attorney General legally bound to represent judge - Federal Constitution, arts. 121, 145(2)*

E ***CIVIL PROCEDURE:*** *Execution - Writ of seizure and sale - Payment of judgment sum - Whether should be paid first to court or directly to judgment creditors - Whether default judgment ceased to have force or effect upon payment of judgment sum - Rules of the High Court 1980, O. 46*

F ***CONSTITUTIONAL LAW:*** *Courts - Judges' immunity - Extent and scope of - Whether wide enough to cover discharge of judge's duty under art. 121 Federal Constitution and written law - Whether instructions of judge entirely within his authority and jurisdiction - Courts of Judicature Act 1964, s. 14(1)*

G

CIVIL PROCEDURE: *Pleadings - Striking out statement of claim - Civil suit against High Court judge - Whether there was reasonable cause of action - Whether cause of action obviously unsustainable - Whether an abuse of process of court - Rules of the High Court 1980, O. 18*
H *r. 19(1)(a), (b), (d)*

These two appeals were by the plaintiffs against the orders of the High Court dismissing the plaintiffs' application to prevent the Attorney General or his officers from acting for the first defendant,
I and allowing the defendants' application to strike out the plaintiffs' statement of claim under O. 18 r. 19(1)(a), (b) or (d) of the Rules of the High Court 1980 ('RHC'). The plaintiffs, also the plaintiffs in another action in the High Court, had obtained a default

judgment for some RM14 million ('judgment sum') against one Public Bank Bhd ('Public Bank') in that action. They sought to enforce the default judgment by way of a writ of seizure and sale, resulting in Public Bank issuing a banker's cheque ('cheque') for the judgment sum in the name of the Senior Assistant Registrar ('SAR'). Subsequently, the SAR set aside the default judgment and, on appeal, the judge in chambers affirmed the SAR's decision. The plaintiffs filed their action against the defendants, claiming, *inter alia*, that they required Public Bank to pay the cheque to the plaintiffs directly but Public Bank refused, and that Public Bank had directly contacted the first defendant, a judge of the Kuala Lumpur High Court, who was at the material time on leave in Singapore. The first defendant gave instructions by way of telephone, directing the SAR to allow and accept Public Bank's payment into court instead. The payment of the cheque was subsequently stopped and when the plaintiffs did not receive the judgment sum, they blamed the defendants, particularly the first defendant, averring that the first defendant's wilful, malicious malfeasance and misfeasance, *mala fide* acts and omissions had caused them loss. In seeking to prevent the Attorney General or his officers from representing the first defendant, the plaintiffs submitted that: (i) the first defendant's acts were not done while sitting in the course of a case as a judge; and (ii) there was an allegation of corrupt practice *etc* – contained in para. 12 of the plaintiffs' statement of claim – and that it would be inappropriate for the Attorney General, who is also the Public Prosecutor, to act for the first defendant. In urging the court to strike out the plaintiffs' statement of claim, the defendants argued that: (a) payment of the judgment sum to the court in the name of the SAR accorded with O. 46 of the RHC; and (b) the first defendant who was sued in the capacity of a judge of the High Court was protected by s. 14(1) of the Courts of Judicature Act 1964 ('CJA'). The court below found in favour of the defendants, resulting in the present appeals.

Held (dismissing the appeals)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) It was uncontroverted that at the material time, the first defendant was a judge of the Kuala Lumpur High Court as well as the head of the civil division having charge of all matters pertaining to the execution of assets in Kuala Lumpur, including writs of seizure and sale. In the title to the action, and para. 2(a) and (b) of the plaintiffs' statement

of claim, the plaintiffs had sued the first defendant as a judge of the High Court. The plaintiffs were bound by their own pleadings. There was no question of the first defendant having been sued in his personal or private capacity. Having determined the official capacity of the first defendant, it was necessary to deal with the performance of the first defendant's duties in relation to execution proceedings in the light of the Federal Constitution ('FC') and any other written law for the purpose of resolving the issue of legal representation under art. 145(2) of the FC. On the facts, the exercise of duties by the first defendant as a judge of the High Court of Malaya at Kuala Lumpur under art. 121 of the FC and the written law was not only performance of the functions of a judge under the FC generally, but also under the written law specifically. In line with the judgment of the then Supreme Court in *Tun Dato' Haji Mohamed Salleh Abas v. Tan Sri Dato Abdul Hamid Haji Omar & Ors*, the Attorney General was under a mandatory duty to provide the first defendant with legal representation, in order to defend and protect the office and institution of the administration of justice in Malaysia. (para 18, 19 & 21)

(2) In filing and serving the writ containing the averments in para. 12 of the statement of claim, plaintiffs' counsel may have been actuated by a strong desire to act in the best interest of his clients. However, it was a source of extreme regret that the plaintiffs had resorted to such averments against the first defendant, which consisted of bare accusations and allegations that did not condescend upon particulars. There was no averment whatsoever that the first defendant had received any gratification, consideration, monetary or other favours, or had any personal interest or benefit in the matter complained of. Nothing turned on the plaintiffs' allegations of corruption or corrupt practice against the first defendant in any specific particular. At most, these were unfounded criticisms and vilification, and no reasonable man could be expected to act on figments of imagination. In the absence of particulars to substantiate them, there was no legal or factual impediment to the Attorney General and his officer providing legal representation to the first defendant. (paras 25 & 28)

(3) The issue, of whether the proceeds of execution by way of a writ of seizure and sale should be paid to the court or to the plaintiffs as execution creditors direct, was regulated by the provisions contained in O. 46 r. 1 to r. 13 of the RHC generally; O. 46 r. 14 to 21 of the RHC governing the duties of the sheriff; and O. 46 r. 22 to r. 27 which provides for sale by the sheriff. Upon a true construction of the aforesaid rules, more specifically O. 46 rr. 13(2), 17 and 21 of the RHC, it was abundantly clear that all monies received pursuant thereto had to be paid into court first and the money so credited shall be paid to the plaintiffs as judgment creditors pursuant to these rules. The plaintiffs' submission that the cheque should be paid direct to the plaintiffs could not be upheld since that would run counter to the rules. In the circumstances, the cheque was rightly made out in favour of the SAR and accepted by the sheriff. When Public Bank paid the judgment sum by way of the cheque in satisfaction of the default judgment, the default judgment ceased to have any force or effect. Since the default judgment in the instant appeal was no longer of any force or effect, the substratum of the plaintiffs' action collapsed, and the plaintiffs no longer had any reasonable cause of action against the defendants. (paras 45, 46, 47, 48, 49 & 50)

(4) The judicial immunity conferred by s. 14(1) of the CJA was wide enough to extend to the discharge of the first defendant's duties under art. 121 of the FC and the written law. These duties included all acts and duties expected or assigned to be performed by the first defendant, both within and outside Malaysia. The instructions and orders made by the first defendant were entirely within his authority and within the limits of his jurisdiction legally conferred upon him by art. 121 of the FC and the written law, regardless of the fact that he was on leave in Singapore and outside the country. The mode and manner including the place from which he exercised that authority (a phone call from Singapore while on leave) were irrelevant. The facts and circumstances available in the court below and now in the instant appeal undoubtedly attracted the application of judicial immunity under s. 14(1) of the CJA. The plaintiffs' purported cause of action was really an exercise in futility under O. 18 r. 19(1)(a) of the RHC, there being no

reasonable cause of action against the first defendant, and so no vicarious liability could be attributed to the second defendant. Hence, the defendants had successfully established that the plaintiffs' statement of claim was devoid of any reasonable cause of action, and capable of being struck out under O. 18 r. 19(1)(a) of the RHC. (paras 69, 70, 71, 72)

(4a) The plaintiffs had failed to plead in their statement of claim certain undisputed facts that would have put the entire picture in proper perspective, which in turn would have plainly and obviously demonstrated that the plaintiffs' purported cause of action arising from the writ of seizure and sale against Public Bank was without any foundation whatsoever. To say the least, it was scandalous, frivolous or vexatious under O. 18 r. 19(1)(b) of the RHC, in the sense of being wholly unnecessary and irrelevant; or that it was obviously unsustainable. Further, on the facts of the present case, the defendants had established an abuse of the process of the court under O. 18 r. 19(1)(d) of the RHC. (paras 76, 77, 78, 79 & 84)

Bahasa Malaysia *Translation Of Headnotes*

Kedua-dua rayuan oleh plaintif-plaintif di sini adalah terhadap keputusan Mahkamah Tinggi kerana menolak permohonan plaintif untuk menghalang Peguam Negara atau pegawai-pegawainya dari mewakili defendan pertama, dan kerana membenarkan permohonan defendan-defendan untuk membatalkan penyata tuntutan plaintif di bawah A. 18 k. 19(1)(a), (b) atau (d), Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Plaintif-plaintif, yang juga merupakan plaintif-plaintif dalam satu tindakan Mahkamah Tinggi lain, telah memperolehi penghakiman ingkar untuk jumlah RM14 juta ('jumlah penghakiman') terhadap Public Bank Bhd ('Public Bank') di dalam tindakan tersebut. Mereka berhasrat menguatkuasakan penghakiman ingkar tersebut melalui satu writ penyitaan dan penjualan, sekaligus menyebabkan Public Bank mengeluarkan cek banker ('cek') untuk jumlah penghakiman atas nama Penolong Kanan Pendaftar ('PKP'). Berikutnya PKP mengenepikan penghakiman ingkar di mana keputusan tersebut, atas rayuan, disahkan oleh hakim dalam kamar. Plaintif-plaintif telah mefail tindakan terhadap defendan-defendan, antara lain menuntut supaya Public Bank terus membayar jumlah penghakiman kepada mereka. Permintaan ini ditolak oleh Public Bank. Plaintif-plaintif juga

mengatakan bahawa Public Bank telah menghubungi secara terus defendan pertama, seorang hakim Mahkamah Tinggi Kuala Lumpur, yang ketika itu sedang bercuti di Singapura, sekaligus menyebabkan defendan pertama memberi arahan kepada PKP melalui telefon supaya menerima pembayaran Public Bank ke dalam mahkamah. Berikutnya, Public Bank telah membatalkan pembayaran melalui cek di atas dan akibatnya plaintif-plaintif telah tidak menerima bayaran jumlah penghakiman. Plaintif-plaintif telah mempersalahkan defendan-defendan, terutama defendan pertama, sambil mendakwa bahawa tindakan defendan pertama yang sengaja, berniat jahat dan *mala fide* telah menyebabkan kerugian kepada mereka. Dalam memohon untuk menghalang Peguam Negara atau pegawai-pegawainya dari mewakili defendan pertama di sini, plaintif-plaintif berhujah bahawa: (i) tindakan-tindakan defendan pertama tidak dibuat semasa menyidangi suatu kes sebagai seorang hakim; dan (ii) oleh kerana terdapat alegasi perbuatan rasuah dll terhadap defendan pertama – seperti yang terkandung di dalam perenggan 12 penyata tuntutan plaintif-plaintif – maka adalah tidak wajar bagi Peguam Negara, yang juga merupakan Pendakwa Raya, untuk mewakili defendan pertama. Dalam memohon mahkamah membatalkan penyata tuntutan plaintif-plaintif, defendan-defendan berhujah bahawa: (a) pembayaran jumlah penghakiman ke dalam mahkamah atas nama PKP adalah sejajar dengan A. 46 KMT; dan (b) defendan pertama yang disaman dalam kapasitinya sebagai seorang hakim Mahkamah Tinggi dilindungi oleh s. 14(1) Akta Mahkamah Kehakiman 1964 ('AMK'). Mahkamah di bawah mendapati untuk defendan-defendan dan plaintif-plaintif merayu.

Diputuskan (menolak rayuan-rayuan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Tidak dinafikan bahawa pada waktu material, defendan pertama adalah seorang hakim Mahkamah Tinggi di Kuala Lumpur dan juga ketua bahagian sivil yang mengendalikan semua perkara berkaitan penyitaan aset di Kuala Lumpur, termasuk writ-writ penyitaan dan penjualan. Di dalam tajuk tindakan, serta perenggan 2(a) dan (b) penyata tuntutan plaintif-plaintif, plaintif-plaintif mendakwa defendan pertama sebagai seorang hakim Mahkamah Tinggi. Plaintif-plaintif adalah terikat dengan pliding-pliding mereka sendiri dan dengan itu tidak timbul soal defendan pertama didakwa atas sifat atau kapasiti peribadinya. Setelah memutuskan kapasiti

rasmi defendan pertama, adalah perlu untuk menangani pula pelaksanaan tanggungjawab defendan pertama dalam hubungannya dengan prosiding pelaksanaan dengan mengambilkira peruntukan Perlembagaan Persekutuan ('PP') dan mana-mana undang-undang bertulis bagi maksud menyelesaikan isu perwakilan undang-undang di bawah fasal 145(2) PP. Di atas fakta, pelaksanaan tanggungjawab oleh defendan pertama sebagai seorang hakim Mahkamah Tinggi Malaya di Kuala Lumpur di bawah fasal 121 PP dan undang-undang bertulis bukan semata-mata pelaksanaan tanggungjawab seorang hakim di bawah PP pada amnya, tetapi juga di bawah undang-undang bertulis khususnya. Sejajar dengan penghakiman Mahkamah Agong di dalam *Tun Dato' Haji Mohamed Salleh Abas v. Tan Sri Dato Abdul Hamid Haji Omar & Ors*, Peguam Negara adalah di bawah tanggungjawab mandatori untuk memberikan representasi undang-undang kepada defendan pertama, bagi membela dan melindungi kedudukan dan institusi pentadbiran keadilan di Malaysia.

(2) Dalam memfail dan menyerahkan writ yang mengandungi dakwaan-dakwaan di dalam perenggan 12 penyata tuntutan, peguam plaintif-plaintif telah didorong oleh keinginan yang kuat untuk bertindak bagi kebaikan klien-kliennya. Bagaimanapun, adalah amat dikesalkan bahawa plaintif-plaintif telah membangkitkan dakwaan-dakwaan tersebut terhadap defendan pertama, yang mengandungi alegasi dan tuduhan-tuduhan kosong yang tidak disokong oleh butiran dan fakta. Tiada pengataan langsung bahawa defendan pertama telah menerima apa-apa suapan, balasan, hadiah-hadiah, sama ada yang berbentuk wang atau sebaliknya, ataupun mempunyai kepentingan atau faedah peribadi dalam perkara yang dirunguti. Tiada bukti khusus dikemukakan bagi tuduhan-tuduhan rasuah atau amalan rasuah yang dibuat oleh plaintif-plaintif terhadap defendan pertama. Paling tinggi pun, ini hanyalah fitnah dan kritikan kosong, dan orang munasabah tidak boleh bertindak atas khayalan-khayalan imaginasi. Dalam ketiadaan butiran-butiran bagi menyokong pengataan-pengataan ini, maka tidak wujud halangan undang-undang atau fakta terhadap Peguam Negara atau pegawai-pegawai untuk memberikan representasi undang-undang kepada defendan pertama.

(3) Isu, sama ada wang yang terhasil dari pelaksanaan melalui writ penyitaan dan penjualan harus dibayar kepada mahkamah ataupun terus kepada plaintif-plaintif selaku pemiutang pelaksanaan, adalah dikawal oleh peruntukan-peruntukan yang terkandung di dalam A. 46 kk. 1 hingga 13 KMT amnya; A. 46 kk. 14 hingga 21 KMT pula mengawalselia tanggungjawab seorang sheriff, sementara A. 46 kk. 22 hingga 27 memperuntukkan penjualan oleh sheriff. Atas pentafsiran sebenar kaedah-kaedah ini, khususnya A. 46 kk. 13(2), 17 dan 21 KMT, jelas bahawa wang-wang yang diterima dari proses tersebut hendaklah dimasukkan ke dalam mahkamah dahulu dan kemudian barulah dikreditkan kepada plaintif-plaintif selaku pemiutang-pemiutang penghakiman di bawah kaedah-kaedah tersebut. Hujah plaintif-plaintif bahawa cek harus dibayar terus kepada mereka tidak boleh dipertahankan oleh kerana itu adalah bertentangan dengan kaedah-kaedah. Oleh yang demikian, cek telah dengan betulnya dibayar atas nama PKP dan diterima oleh sheriff. Bilamana Public Bank membayar jumlah penghakiman melalui cek sebagai memenuhi jumlah penghakiman, penghakiman ingkar sudah tidak lagi mempunyai kesan atau kuatkuasa. Oleh kerana penghakiman ingkar dalam rayuan semasa sudah tidak berkesan atau berkuatkuasa, maka asas tindakan plaintif-plaintif runtuh dengan sendirinya. Oleh itu, plaintif-plaintif tidak mempunyai kausa tindakan yang munasabah terhadap defendan-defendan.

(4) Imuniti kehakiman yang diberikan oleh s. 14(1) AMK adalah cukup luas untuk merangkumi pelaksanaan tugas-tugas defendan pertama di bawah fasal 121 PP dan undang-undang bertulis. Bidang tugas ini termasuk semua perbuatan dan tugas yang dijangkakan dari defendan pertama atau yang dipertanggungkan ke atasnya, sama ada ketika beliau berada di dalam atau di luar Malaysia. Arahan-arahan dan perintah yang diberi oleh defendan pertama di sini adalah di dalam kuasanya dan terangkum ke dalam bidangkuasa seperti yang diberikan oleh undang-undang kepada beliau di bawah fasal 121 dan juga undang-undang bertulis, walaupun beliau sedang bercuti di Singapura dan berada di luar Malaysia. Cara dan bagaimana beliau menjalankan tugasannya, termasuk tempat dari mana beliau melakukannya (panggilan telefon dari Singapura sementara sedang bercuti), adalah tidak relevan. Tidak syak lagi bahawa fakta dan halkeadaan

yang terserlah di hadapan mahkamah di bawah dan juga di rayuan di sini telah menarik pelaksanaan imuniti kehakiman di bawah s. 14(1) AMK. Kausa tindakan plaintif di bawah A. 18 k. 19(1)(a) KMT adalah sesuatu yang sia-sia, disebabkan tidak terdapat sebarang kausa tindakan yang munasabah terhadap defendan pertama, sekaligus tidak membangkitkan apa-apa liabiliti vikarius terhadap defendan kedua. Defendan-defendan telah membuktikan bahawa penyata tuntutan plaintif-plaintif adalah ketandusan kausa tindakan yang munasabah dan boleh dibatalkan di bawah A. 18 k. 19(1)(a) KMT.

(4a) Dalam penyata tuntutan mereka, plaintif-plaintif gagal memplid beberapa fakta tidak dipertikai yang boleh menyerlahkan kes mereka dalam perspektifnya yang teratur, sekaligus menunjukkan bahawa kausa tindakan mereka yang berbangkit dari writ penyitaan dan penjualan terhadap Public Bank langsung tidak berasas. Paling tidakpun, ia adalah berskandal, remeh atau menyusahkan di bawah A. 18 k. 19(1)(b) of KMT, dalam ertikata ia langsung tidak perlu, tidak relevan atau amat jelas tidak boleh dipertahankan. Selain itu, berdasarkan fakta kes semasa, defendan-defendan juga telah membuktikan salahguna proses mahkamah di bawah A. 18 k. 19(1)(d) KMT.

Case(s) referred to:

Ambard v. Attorney General [1936] AC 322 ***(refd)***

Anowar Hussain v. Ajoy Kumar AIR [1965] SC 1651 ***(refd)***

Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd [1989] 1 LNS 26 HC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Boey Oi Leng v. Trans Resources Corporation Sdn Bhd [2002] 1 CLJ 405 HC ***(refd)***

Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

PP v. Dato' Seri Anwar Ibrahim (Decision Regarding Counsel for Christopher Fernando's Objection to the Attorney General's Application to Represent Dato' Augustine Paul) [2002] 7 CLJ 186 HC ***(foll)***

Gabriel Peter & Partners (Suing as a Firm) v. Wee Chong Jin [1988] 1 SLR 374 ***(refd)***

Gallo v. Dawson [1988] ALR 801 ***(refd)***

Hadi Hassan v. Suria Records Sdn Bhd & Ors [2004] 8 CLJ 225 HC ***(refd)***

Harvey v. Derrick [1995] 1 NZLR 314 ***(refd)***

Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases [1983] 2 CLJ 214; [1983] CLJ (Rep) 579 HC ***(refd)***

Indah Desa Saujana Corp Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2005] 4 CLJ 925 HC ***(refd)***
Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***
Letang v. Cooper [1965] 1 QB 222 ***(refd)***
Lim Kean v. Choo Koon [1969] 1 LNS 94 HC ***(refd)***
Malaysian Bar v. Tan Sri Dato' Abdul Hamid Omar [1989] 2 CLJ 373; [1989] 1 CLJ (Rep) 92 SC ***(refd)***
Moll v. Butler [1985] 10 Fam LR 544 SCNSW ***(refd)***
Nakhla v. Mc Carthy [1978] 1 NZLR 291 ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC ***(refd)***
Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karambunai Resorts Sdn Bhd & Ors [1996] 1 CLJ 257 CA ***(refd)***
Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v. Tan Beng Sooi [1997] 2 CLJ 409 CA ***(refd)***
R v. Commissioner of Police of the Metropolis Ex P Blackburn (No. 2) [1968] 2 QB 150 ***(refd)***
Raja Zainal Abidin Raja Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***
Saw Gaik Beow v. Cheong Yew Weng & Ors [1989] 1 LNS 75 HC ***(refd)***
Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC ***(refd)***
Sirros v. Moore & Ors [1975] QB 118 ***(refd)***
Standard Chartered Bank v. Yong Chan [1974] 1 MLJ 157 ***(refd)***
Tai Choi Yu v. Ian Chin Hon Chong [2002] 2 CLJ 259 HC ***(refd)***
Taylor v. Canada (Attorney General) [2000] 3 FC 298 ***(refd)***
Tee Yam v. Timbalan Menteri, Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2005] 6 CLJ 550 HC ***(refd)***
Tractors Malaysia Berhad v. Tio Chee Hing [1975] 2 MLJ 1 ***(refd)***
Tun Dato' Hj Mohamed Salleh Abas v. Tan Sri Dato Abdul Hamid Hj Omar & Ors [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294 SC ***(foll)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997, s. 15
Courts of Judicature Act 1964, ss. 14(1), 17, 20
Emergency (Essential Powers) Ordinance 22 of 1970, s. 2(1)
Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 10
Federal Constitution, arts. 121, 125(3), 145(2)
Interpretation Acts 1948 and 1967, s. 3
Judges Code of Ethics 1994, para 3(1)(a), (d)
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d), (2), O. 46 rr. 13(2), 17, 21, O. 47

Judicial Officers Protection Act 1950 [Ind], s. 1

A *For the appellants - Darshan Singh Khaira; M/s Darshan Singh & Co*
For the respondents - Dato' Mary Lim Thiam Suan (Narkunavathy Sandareson with her) SFC

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D1-21-54-2005]

B *Reported by Suresh Nathan*

JUDGMENT

Low Hop Bing JCA:

C

Appeals

[1] These two appeals lodged by the appellants – plaintiffs ("the plaintiffs") arose from the orders of the Kuala Lumpur High Court made pursuant to two summonses in chambers, the particulars of
D which are:

Application	Order
Encl (8)	Plaintiffs' application, to prevent the Attorney General or his officers from acting for the first respondent-defendant ("the first defendant"), was dismissed with costs.
Encl (6)	Application of the respondents-defendants ("the defendants"), to strike out the plaintiffs' statement of claim, under O. 18 r. 19(1)(a), (b) or (d) of the Rules of the High Court 1980, was allowed with costs.

(See *Indah Desa Saujana Corp Sdn. Bhd & Ors v. James Foong*
G *Cheng Yuen & Anor* [2005] 4 CLJ 925 HC)

[2] After hearing submissions, we dismissed these appeals. Our grounds now follow.

H **[3]** For convenience, the parties herein are referred to in their respective capacities as plaintiffs and defendants in the High Court.

Factual Background

[4] On 25 October 2002, the plaintiffs, also the plaintiffs in
I another action ie Kuala Lumpur High Court Civil Suit No: D2-22-987-2000, had obtained default judgment for some RM14 million ("the judgment sum") against Public Bank Bhd ("Public Bank") in that action.

[5] The plaintiffs sought to enforce the default judgment by way of a writ of seizure and sale on 15 November 2002. A

[6] As a result, Public Bank issued a banker's cheque ("the cheque") for the judgment sum in the name of the Senior Assistant Registrar ("the SAR"). B

[7] On 18 November 2002, the SAR granted a stay of the default judgment.

[8] On 24 April 2003, the SAR set aside the default judgment. On appeal, the judge in chambers had on 22 March 2005 affirmed the SAR's decision. The plaintiffs filed their action against the defendants on 14 May 2005. C

[9] Para 5 of the plaintiffs' statement of claim averred, *inter alia*, that the plaintiffs required Public Bank to pay the cheque to the plaintiffs directly but Public Bank refused, and that Public Bank had directly contacted the first defendant, a judge of the Kuala Lumpur High Court, who was at the material time on leave in Singapore. He gave instructions by way of a telephone call and directed the SAR to allow and accept Public Bank's payment into court instead. D E

[10] Subsequently, payment of the cheque was stopped. When the plaintiffs did not receive the judgment sum, they blamed the defendants, particularly the first defendant, alleging that: F

(1) The first defendant being attached to the civil division of the Kuala Lumpur High Court was only to deal with the cases assigned thereto;

(2) There was no direction or change of direction for the first defendant to deal with plaintiffs' case in the commercial division; G

(3) The first defendant was acting as the agent of Public Bank when he gave instructions to the SAR to accept payment into court; H

(4) The first defendant was obviously allowing Public Bank to play for time and delay the encashment of the cheque;

(5) The first defendant must have known that Public Bank was buying time and had never intended to honour the cheque; I

(6) The first defendant's actions and omissions have a tendency to cause loss of confidence and damage the integrity of the banking practice and system in the country;

(7) The first defendant wrongly interfered with the process of justice and execution and wrongly induced the bailiffs and the SAR to accept the cheque when he had no business, duty, right or responsibility to do so; and

(8) The first defendant's acts were contrary to the provisions of para 3(1)(a) and (d) of the Judges Code of Ethics 1994, s. 15 of the Anti-Corruption Act 1997, s. 20 of the Courts of Judicature Act 1964, s. 2(1) of the Emergency (Essential Powers) Ordinance 22 of 1970 and the Chief Justice's Directive No: KHN 156 dated 10 October 1998.

[11] The plaintiffs claim that the first defendant's "wilful, malicious (intentional) malfeasance and misfeasance, *mala fide* acts and omissions have caused the plaintiffs loss and damage, thereby seeking the judgment sum, in addition to aggravated, punitive and exemplary damages of RM10,000,000, together with interest thereon at 8% p.a. with effect from 25 October 2002, and costs.

Legal Representation

[12] In seeking to prevent the Attorney General or his officers from representing the first defendant, plaintiffs' learned counsel Mr. Darshan Singh Khaira submitted that:

(1) The first defendant's acts were not while sitting in the course of a case as a judge;

(2) There was an allegation of corrupt practice etc and it is inappropriate for the Attorney General who is also the Public Prosecutor to act for the first defendant; and

(3) The Attorney General is embarrassed as he is in a conflict of interest situation especially as he represents public interest.

[13] Support was sought, *inter alia*, in:

(1) Article 145 of the Federal Constitution ("art. 145"); and

(2) *PP v. Dato' Seri Anwar Ibrahim (Decision Regarding Counsel for Christopher Fernando's Objection to the Attorney General's Application to Represent Dato' Augustine Paul)* [2002] 7 CLJ 186 HC ("Dato Augustine Paul").

[14] On the other hand, learned Senior Federal Counsel, Dato' Mary Lim Thiam Suan (Ms. Narkunavathy Sandareson with her) took the position that the decision of the court below is perfectly sound, as the Attorney General is, under art.145, bound, and in the interest of the administration of justice, to represent a judge who performs functions under the Federal Constitution, deriving support from *Tun Dato' Hj Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors* [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294 SC ("Tun Salleh Abas").

[15] The court below has sustained the learned Senior Federal Counsel's submission.

[16] At this juncture, we shall refer to art. 145(2) which provides, *inter alia*, that it shall be the duty of the Attorney General to discharge the functions conferred on him by or under the Federal Constitution or any other written law.

[17] Article 145 was considered by the then Supreme Court in *Tun Salleh Abas, supra.* The pertinent facts are that at the hearing of the Attorney General's application by way of notice of motion to set aside an *ex parte* order made by five Supreme Court judges, restraining a tribunal set up under art. 125(3) of the Federal Constitution to inquire into and make recommendations concerning Tun Salleh Abas. Tun Salleh Abas had obtained the *ex parte* order. He applied to strike out the Attorney General's notice of motion on the ground, *inter alia*, that it was not competent for the Attorney General to represent the five members of the tribunal. Hashim Yeop A Sani, SCJ (later CJ (M)) delivering judgment of the court, held that the Attorney General is a public officer under the Federal Constitution and art. 145 properly read gives ample power to the Attorney General to represent the government and anybody or person performing any function thereunder.

[18] It is uncontroverted that at the material time, the first defendant was a judge of the Kuala Lumpur High Court as well as the head of civil division having charge of all matters pertaining to the execution of assets in Kuala Lumpur, including writs of seizure and sale. In the title to the action, and para 2(a) and (b) of the plaintiffs' statement of claim, the plaintiffs have sued the first defendant as a judge of the High Court. The plaintiffs are bound by their own pleadings: see eg, *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; *Standard Chartered Bank v. Yong Chan* [1974] 1

MLJ 157; and *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330. There is no question of the first defendant having been sued in his personal or private capacity.

[19] Having determined the official capacity of the first defendant, we find it necessary to deal with the performance of the first defendant's duties in relation to execution proceedings in the light of the Federal Constitution and any other written law for the purpose of resolving the issue of legal representation under art. 145(2).

Execution Proceedings

[20] In the discharge of his duties as a judge of the High Court in Kuala Lumpur, especially in relation to execution of assets by way of a writ of seizure and sale, O. 46 and O. 47 of the Rules of the High Court 1980 made under s. 17 of the Courts of Judicature Act 1964 ("s. 17") would apply. Section 3 of the Interpretation Acts 1948 and 1967 defines "written law" as, *inter alia*, "Acts of Parliament and subsidiary legislation made thereunder". Subsidiary legislation contained in the Rules of the High Court 1980 in general, made under s. 17, and O. 46 and O. 47 thereof in particular, are part and parcel of written law (collectively "the written law") and has the force of law governing matters of procedure.

[21] Article 121 of the Federal Constitution provides for two High Courts of co-ordinate jurisdiction and status *viz* one in the States of Malaya and one in the States of Sabah and Sarawak. The exercise of duties by the first defendant as a judge of the High Court of Malaya at Kuala Lumpur under art. 121 and the written law is not only performance of the functions of a judge under the Federal Constitution generally, but also under the written law specifically. In line with the judgment of the then Supreme Court in *Tun Salleh Abas, supra,* the Attorney General is under a mandatory duty to provide the first defendant with legal representation, in order to defend and protect the office and institution of the administration of justice in Malaysia.

[22] A similar sentiment was expressed in *Dato Augustine Paul, supra.* There, defence counsel Mr. Christopher Fernando applied to commit Augustine Paul J (now FCJ) for contempt for words uttered by the judge in the course of a criminal trial. There was an objection to the Attorney General's application to represent the

judge. Hashim bin Yusoff J (now FCJ) held that the words were uttered in the course of proceedings in the criminal trial. It was in the course of his work in relation to the office which is established under the Federal Constitution. The Attorney General being an officer established under the Federal Constitution and the Government Proceedings Act 1956 must properly step in and defend the judge not as a private individual but in the protection of such office, the institution of the judiciary and in the interest of the administration of justice in Malaysia.

[23] The issue of legal representation was less problematic in *Malaysian Bar v. Tan Sri Dato' Abdul Hamid Omar* [1989] 2 CLJ 373; [1989] 1 CLJ (Rep) 92 SC. There, the Malaysian Bar sought leave to apply for committal order against Tan Sri Dato (now Tun) Abdul Hamid bin Omar for alleged contempt of court on the alleged ground of attempting to prevent, frustrate and interfere with the sitting of the then Supreme Court, when holding the office of the Acting Lord President thereof. At the hearing of that application, in the absence of any objection, the Attorney General and his officer had no difficulty in providing legal representation to the Acting Lord President.

Allegation Of Corruption

[24] Paragraph 12 of the plaintiff's statement of claim avers, *inter alia,* that the first defendant's acts were in breach of:

(a) the Judges' Code of Ethics 1994;

(b) s. 15 of the Anti-Corruption Act 1997; and

(c) s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

[25] In filing and serving the writ containing the above averments in para 12 of the statement of claim, plaintiffs' counsel may have been actuated by a strong desire to act in the best interest of his clients. However, it is a source of extreme regret that the plaintiffs have resorted to these averments against the first defendant. These averments consist of bare accusations and allegations which do not condescend upon particulars. There was no averment whatsoever that the first defendant had received any gratification, consideration, monetary or other favours, or had any personal interest or benefit in the matter complained of. Nothing turned on the plaintiffs' allegations of corruption or corrupt practice against

A the first defendant in any specific particular. At most, these are unfounded and unwarranted criticisms and vilifications. No reasonable man can be expected to act on figments of imagination.

[26] The draftsman of the plaintiffs' statement of claim and the B person who has approved of the above averments had crafted and drafted them in very strong language, bringing about criticisms and vilifications against the first defendant. In this regard, it is certainly not out of place to remind the people concerned of the words of wisdom spoken by Lord Atkin in *Ambard v. Attorney* C *General* [1936] AC 322 *viz*:

> The path of criticism is a public way: the wrong headed are permitted to err therein: provided that the members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right D of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even thought outspoken, comments of ordinary men.

E **[27]** Strong support for Lord Atkin was shown in *R v. Commissioner of Police of the Metropolis Ex P Blackburn (No. 2)* [1968] 2 QB 150 by Lord Denning MR in the following words:

> All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their F criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion G requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

[28] Reverting to the plaintiffs' averments in para 12 of the statement of claim, in the absence of particulars to substantiate H them, we can find no legal or factual impediment to the Attorney General and his officer providing legal representation to the first defendant.

[29] We therefore hold that, in relation to encl. (8), the court I below has correctly held that the Attorney General and his legal officers are legally bound to represent the first defendant.

Striking Out Under O. 18 r. 19

[30] In urging the court to strike out the plaintiffs' statement of claim, under O. 18 r. 19(1)(a), (b) or (d), the defendants argued that:

(1) As of 18 November 2002, Public Bank has obtained an interim stay of the writ of seizure and sale pending the disposal of Public Bank's application to set aside the default judgment;

(2) Public Bank had on 24 April 2003 successfully obtained an order from the registrar setting aside the judgment, and on 22 March 2005, the registrar's decision was affirmed on appeal by the judge in chambers;

(3) Payment of the judgment sum to the court in the name of the SAR accords with O. 46; and

(4) The first defendant who was sued in the capacity of a judge of the High Court is protected by s. 14(1) of the Courts of Judicature Act 1964 ("s. 14(1)").

[31] The plaintiffs are of the view that:

(1) their action is not obviously unsustainable, in the context of *Bandar Builder Sdn. Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC; and *Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karambunai Resorts Sdn. Bhd & Ors* [1996] 1 CLJ 257 CA; and

(2) the first defendant was not acting in a judicial capacity and is therefore not protected by s. 14(1), citing, *inter alia*, *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v. Tan Beng Sooi* [1997] 2 CLJ 409 CA.

[32] The court below held that the plaintiffs' action against the defendants was "bound to fail", being wholly bereft of any cause of action and is clearly scandalous, frivolous and vexatious and an abuse of the court process.

[33] The relevant portion of O. 18 r. 19(1)(a), (b) or (d) merits reproduction as follows:

> 19(1) The Court may at any stage of the proceedings order to be struck out … any pleading … of any writ in the action … on the ground that:

A (a) it discloses no reasonable cause of action …; or

(b) it is scandalous, frivolous or vexatious; or

(c) …;

B (d) it is otherwise an abuse of the process of the Court;

[34] When the defendants rely on O. 18 r. 19(1)(a), no evidence shall be admissible: O. 18 r. 19(2). This means that the defendants must refer only to the plaintiffs' statement of claim for the purpose of urging the court to strike it out.

C

[35] In relation to the defendants' reliance on O. 18 r. 19(1)(b) or (d), affidavit may be resorted to and analysed.

[36] Order 18 r. 19(1)(a), (b) or (d) empowers the court at any D stage of the proceedings to strike out the pleadings eg, the plaintiffs' statement of claim herein on the ground that it discloses no reasonable cause of action; or it is scandalous, frivolous or vexatious; or is otherwise an abuse of the process of the court, respectively.

E

[37] There is a plethora of weighty authorities setting out trite principles governing an application under O. 18 r. 19(1). It has been consistently stated by our courts that any pleading may be struck out if it is obviously unsustainable. Such discretionary F power may only be exercised in plain and obvious cases: see eg, *Tractors Malaysia Berhad v. Tio Chee Hing* [1975] 2 MLJ 1; *Bandar Builder Sdn. Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; *Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karambunai Resorts Sdn. Bhd. & Ors* [1996] 1 CLJ 257; G *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 and *Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases* [1983] 2 CLJ 214; [1983] CLJ (Rep) 579.

[38] With the aforesaid principles in mind, we proceeded to H consider the specific provisions relied on by the defendants.

No Reasonable Cause Of Action

[39] A reasonable cause of action means simply a factual situation I the existence of which entitles one person to obtain from the court a remedy against another person: per Diplock LJ in *Letang v. Cooper* [1965] 1 QB 222 at 242. This definition was followed in *Lim Kean v. Choo Koon* [1969] 1 LNS 94; *Nasri v. Mesah*

[1970] 1 LNS 85; *Saw Gaik Beow v. Cheong Yew Weng & Ors* [1989] 1 LNS 75; *Newacres Sdn. Bhd v. Sri Alam Sdn. Bhd.* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321; and *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69.

[40] The defendants bear the burden of establishing that the plaintiffs have no reasonable cause of action against them.

[41] The answer to the question of whether the defendants have succeeded in establishing this ground is to be found by reference to the plaintiffs' entire statement of claim which merits reproduction as follows:

1. The Plaintiffs were at all material times judgment creditors *vide* a default judgment dated 25.10.2002 in favour of the Plaintiffs against Public Bank Berhad (6463-H) as Defendant in the Kuala Lumpur High Court Civil Suit No. D2-22-987-2002.

2(a) The 1st Defendant was at all material times a Judge of the High Court attached to the Civil Division at Wisma Denmark, Jalan Ampang, Kuala Lumpur.

2(b) The 2nd Defendant is the employer principal of the 1st Defendant and all other administrators, legal and judicial staff including the Senior Assistant Registrars and the Bailiffs.

3. Pursuant to the said judgment dated 25.10.2002, the Plaintiffs issued a Writ of Seizure and Sale *vide* Writ of Execution No. AE-37-59-2002 dated 13.11.2002 against the properties of the said Public Bank Berhad.

4. The said Defendant, Public Bank Berhad thereupon issued their own Bankers Cheque No. 147363 dated 15.11.2002 for RM14,362.312.00 in favour of Penolong Kanan Pendaftar, Mahkamah Tinggi, Kuala Lumpur in purported accord and settlement and satisfaction of the said Writ of Execution.

5. The Plaintiffs requested and required the said Public Bank Berhad to pay the cheque directly to the Plaintiffs but the said Public Bank Berhad refused to do so and directly contacted the 1st Defendant who directed the Senior Assistant Registrar to allow and accept payment by the Public Bank Berhad instead into Court.

6. The said Penolong Kanan Pendaftar then informed the two Bailiffs of the High Court, Kuala Lumpur, namely:

(a) Zainudin bin Ismail, and

(b) Mohd Yusuf bin Jamaludin to stop the said execution although the Plaintiffs did not agree to do so and the judgment sum together with interests, costs and Bailiffs' expenses and commissions were not tendered in full.

7. At the said material time, there was no stay of execution.

8. Thereafter the said Public Bank Berhad stopped payment and the said Bankers Cheque drawn on themselves was returned by the Accountant General as "tidak laku".

9. The Plaintiffs aver that a bankers cheque cannot be revoked or stayed or withdrawn and in law is as good as gold and the Plaintiffs had the faith, trust and confidence that it would be honoured.

10. The said Public Bank Berhad also failed to tender or pay the court Bailiffs commission of RM287,246.24 for execution expenses, interests and costs despite repeated reminders to do so from the Penolong Kanan Pendaftar.

11(a) The 1st Defendant who is attached to the Civil Division (but the Plaintiffs' said case was in the Commercial Division) thereupon as agent, employee and/or at the request of the officers, solicitors or employees of Public Bank Berhad telephoned the Penolong Kanan Pendaftar, High Court, Kuala Lumpur, namely, Encik Mohammad Nordin bin Abd Rauf, in charge of the matter to accept the said bankers cheque as payment into court.

(b) The 1st Defendant was obviously allowing the said Public Bank Berhad to play for time and delay the encashment of the bankers cheque.

(c) The Plaintiffs have suffered a detriment to their disadvantage as they have a legitimate expectation that in law and on the facts that the banker's cheque would be cleared and the Defendants are now stopped from asserting or denying otherwise.

(d) The 1st Defendant must have known that Public Bank Berhad was buying time and had never intended to honour the cheque which in law and in fact could not be stopped or revoked.

(e) The Plaintiffs had a legitimate expectation that the banker's cheque will be honoured.

(f) The Plaintiffs aver that the actions and omissions of the 1st Defendant have a tendency to cause loss of confidence and damage the integrity of the banking practices and system in the country.

12 (a) The Plaintiffs aver that the 1st Defendant had wrongly interfered with the process of justice and execution and wrongly induced the employees, officers and agents of the 2nd Defendant to accept the said cheque when he had no business, duty, right or responsibility to do so.

(b) The said acts were in breach and contrary to the Judges' Code of Ethics 1994 in particular paragraph 3(1)(a) and (d).

(c) The said acts were also in breach and contrary to Section 15 of the Prevention of Corruption Act 1997 *(sic)* (Act 575 -97).

(d) The said acts were also contrary to Section 20 of the Courts of Judicature Act 1964 whereby the 1st Defendant was assigned to the Civil Division of the High Court and to deal with cases only assigned thereto and there was no direction or change of direction for him to deal with cases in the Commercial Division.

(e) The said acts also come within the definition of corrupt practice within Section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

(f) The said acts were also in breach and contrary to the Chief Justice of Malaysia Directive No. KHN 156 dated 10.10.1998.

13. The Plaintiffs aver that the 1st Defendant made the telephone call to the said Senior Assistant Registrar from Singapore although he was on leave.

14. Thereafter by a letter dated 16.03.2004, the 1st Plaintiff complained to the Chief Justice who replied by letter dated 14.05.2004 that he was investigating the matter but there has been no reply to date.

15. The Plaintiffs aver that the Defendants by their wilful, malicious (intentional) malfeasance and misfeasance, *mala fide* acts and omissions have caused loss and damage to the Plaintiffs and even inflicted unlawful losses on the 2nd Defendant itself.

Particulars of Loss

(a) Judgment sum	RM10,000,000.00
(b) Damages	RM 750,000.00
(c) Costs	RM 225.00
(d) Interest at 8% effect from 25-10-2002 till realization	RM15,511,296.00
(e) Bailiffs' commission	RM 287,246.24

16. The Plaintiffs claim aggravated, punitive and exemplary damages in the minimum sum of RM10 million.

17. The Plaintiffs aver that unless the Defendants are mulcted in damages, costs and ordered to make good the loss, the public will lose faith and confidence in the administration of justice and in the legal system and rule of law.

18. Whereof the Plaintiffs claim judgment for:

(a) RM14,362.00

(b) Aggravated, punitive and exemplary damages in the sum of RM10 million;

(c) Interests thereon at 8% per annum with effect from 25.10.2002;

(d) Costs; and

(e) Further or other order.

Dated this 14th day of May 2005.

[42] As the plaintiffs' statement of claim hinges heavily on the process of execution, in particular, the writ of seizure and sale, a detailed examination is warranted.

Writ Of Seizure And Sale

[43] Plaintiffs' purported cause of action was based on a writ of seizure and sale as a process of execution to satisfy the judgment sum. Plaintiffs maintained that the cheque should be paid direct to them instead of payment in the name of the SAR.

[44] The court below held that O. 46 clearly postulates that all payments on judgment sums must always be paid into court through the SAR and this includes all monies collected by the sheriff pursuant to a writ of seizure and sale as the sheriff must be in the irrefutable position to collect his commission; and only the sheriff is empowered to call off the writ of execution or writ of seizure and sale process.

[45] This issue, of whether the proceeds of execution by way of a writ of seizure and sale should be paid to the court or to the plaintiffs as execution creditors direct, is regulated by the provisions contained in O. 46 r. 1 to r. 13 generally; O. 46 r. 14 to 21 governing the duties of the sheriff; and O. 46 r. 22 to r. 27 which provides for sale by the sheriff.

[46] More specifically, O. 46 r. 13(2), r. 17 and r. 21 read:

> O. 46 r. 13(2) Where the movable property seized under a writ of execution or distress is sold by the sheriff **or he receives the amount of the levy without sale,** any sums of money deposited by the execution creditor must, so far as the monies coming to the hands of the sheriff will allow, be refunded to the execution creditor.
>
> O. 46 r. 17 **The proper officer receiving any money under any writ of execution** or distress must give for every sum so received a receipt.
>
> O. 46 r. 21 Subject to these rules … **any sum of money paid** by the sheriff to the credit of the execution creditor or by the **judgment debtor, under r. 17** shall, subject to any order of court, be paid to the execution creditor or judgment debtor respectively on his application without an order. (emphasis added)

[47] Upon a true construction of the aforesaid rules, with the above emphasis, it is abundantly clear to us that all monies received pursuant thereto have to be paid into court first and the money so credited shall be paid to the plaintiffs as judgment creditors pursuant to these rules. We are unable to uphold the plaintiffs' submission that the cheque should be paid direct to the plaintiffs, as that would run counter to the rules. In the circumstances, the cheque was rightly made out in favour of the SAR and accepted by the sheriff.

[48] When Public Bank paid the judgment sum by way of the cheque in satisfaction of the default judgment, the default judgment ceased to have any force or effect.

[49] The High Court of Singapore expressed this sentiment in the following passage:

> "But common sense, wholly apart from authority, tells one that, when the total amount has been paid which is ordered by a judgment to be paid, the judgment ought no longer to be of any force or effect'" per Choor Singh J in *United Investment & Finance Ltd v. Universal Service Agency* [1965] 1 LNS 191 quoting *Clissold v. Cratchley & Ors* [1910] 2 KB 244 @ page 249.

[50] Since the default judgment in the instant appeal ought no longer to be of any force or effect, the substratum of the plaintiffs' action collapses, and the plaintiffs no longer have any reasonable cause of action against the defendants.

Judicial Immunity

[51] The doctrine of judicial immunity encompasses immunity at common law and under statute. Common Law jurisdictions have shown extensive recognition for this doctrine.

[52] By way of illustration, the Courts in England, Australia and New Zealand apply the common law doctrine of judicial immunity, while Malaysia, India and Canada express the doctrine of judicial immunity in statutory provisions.

Judicial Immunity At Common Law

[53] In England, the Court of Appeal in the celebrated case of *Sirros v. Moore & Ors* [1975] QB 118 dismissed an appeal by a plaintiff in an action against a judge, arising from words spoken by the judge, the orders he gave and the sentences he imposed. The following principles may be culled therefrom:

(1) No action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him;

(2) No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitables, he is not liable to an action;

(3) The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for *habeas corpus*, or a writ of error or *certiorari*, or take some such step to reverse his ruling;

(4) If the judge has accepted bribes or has been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts;

(5) The reason for judicial immunity is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear;

(6) This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be;

(7) Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself, "If I do this, shall I be liable in damages?";

(8) If the act was, or purported to be, a judicial act and was within the judicial powers of the judge, he is immune from civil liability. Public policy requires that the judge's conduct should not be impugned; and

(9) Where a judge, though acting within his powers, is shown to have acted so perversely or so irrationally that what he did should not be treated as a judicial act at all, the remedy of his removal from office would be available, but in the public interest, his conduct should not be open to debate in a private action.

[54] In Australia, the courts have shown a similar rationale and test for judicial immunity. In *Gallo v. Dawson* [1988] ALR 801, the High Court struck out a suit brought against a judge as he is not liable to be sued in respect of acts done in the performance of his judicial duties.

[55] In *Moll v. Butler* [1985] 10 Fam LR 544 SCNSW, the Supreme Court of New South Wales was faced with an application to summarily terminate (similar to our O. 18 r. 19(1)) the action brought against a judge of the Family Court of Australia for committing the plaintiff to prison for contempt. The court struck out the action after finding that the judge had jurisdiction to make the orders in question and was immune from action, applying the principles enunciated in *Sirros, supra.*

[56] In *Nakhla v. Mc Carthy* [1978] 1 NZLR 291 the New Zealand Court of Appeal held that absolute immunity is accorded to a judge from civil proceedings for acts done in the exercise of his judicial office. Such immunity is not as a private right but to ensure that in the public interest the administration of justice will be carried on without fear of the consequences, without hope or favour.

[57] In *Harvey v. Derrick* [1995] 1 NZLR 314, the New Zealand Court of Appeal through Richardson J re-affirmed the rationale for judicial immunity in the following passage:

> A range of public interest considerations has been advanced by Court and commentators to justify judicial immunity. The primary grounds are that the public interest requires an independent judiciary free from the fear of vexatious personal actions, and judicial immunity is necessary to protect the free and independent exercise of judgment in the public interest; that it is crucial in a democracy that Judges be perceived as fair and responsible and judicial immunity is necessary to preserve the dignity and respect of the judicial system as a whole; and that without a rule of judicial immunity it may become increasingly difficult to attract men and women of the highest character and ability to judicial office.

Statutory Judicial Immunity

[58] In Canada, Judges' judicial immunity is recognized and fully protected by the Constitution Act 1982 and the Canadian Charter of Rights and Freedoms.

[59] In *Taylor v. Canada (Attorney General)* [2000] 3 FC 298, the Federal Court of Canada held, *inter alia*, that:

(1) The most important attributes, that judges owe to the public objectivity, independence and impartiality, must be protected; and any innovative legal principle that encroaches on these attributes must be carefully scrutinized; and

(2) It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely; without favour and without fear. This provision of law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.

[60] In India s. 1 of the Judicial Officers Protection Act 1950, where relevant, reads:

> No Judge, … or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of.

[61] Section 1 was considered in *Anowar Hussain v. Ajoy Kumar* AIR [1965] SC 1651. The Supreme Court of India held as follows:

> If the act done or ordered to be done in the discharge of judicial duties is within his jurisdiction, the protection is absolute and no enquiry will be entertained whether the act done or ordered was erroneously, irregularly or even illegally, or was done or ordered without believing in good faith, that he had jurisdiction to do or order the act complained of. If the act done or ordered is not within the limits of his jurisdiction, the Judicial Officer acting in the discharge of his judicial duties is still protected, if at the time of doing or ordering the act complained of, he in good faith believed himself to have jurisdiction to do or order the act. The expression jurisdiction does not mean the power to do or order the act impugned, but generally the authority of the Judicial Officer to act in the matter.

[62] Within our shores, judicial immunity is enacted in s. 14(1) which reads:

> No Judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do so or order the act complained of.

[63] In our view, the applicability of the doctrine of judicial immunity under s. 14(1) must be considered in the light of the facts and circumstances prevailing in each particular case, especially conduct which comes within the ambit of the expression "acting judicially".

[64] Section 14(1) was considered in *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v. Tan Beng Sooi* [1997] 2 CLJ 409 CA. The relevant facts reveal that the registrar of the Johor Bahru High Court had issued a circular to licensed auctioneers. The circular provided for a fixed sum payable in cases of abortive auctions. Abdul Malek Ahmad JCA (later PCA) delivering judgment of the court held that the registrar was not acting judicially in issuing the circular, in which case s. 14(1) provides no protection and so the proceedings against the office of the registrar were held to be in good order.

[65] On the other hand, in *Tai Choi Yu v. Ian Chin Hon Chong* [2002] 2 CLJ 259 HC, the defendant, judge of the High Court of Sabah and Sarawak, was sued by the plaintiff in respect of an alleged libel contained in the defendant's written judgment delivered in a civil suit in Miri High Court in the discharge of his judicial function as the trial judge. Sulaiman Daud JC (now JCA) invoked s. 14(1) and held that in view of the immunity conferred on a judge thereunder, the plaintiff's action against the defendant is clearly unsustainable and is doomed to fail right from the outset.

[66] In *Tee Yam v. Timbalan Menteri, Menteri Keselamatan Dalam Negeri Malaysia & Ors* [2005] 6 CLJ 550 HC, Jeffrey Tan J had the occasion to consider an equipollent provision contained in s. 10 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("s. 10") which provides, *inter alia*, that every member of the advisory board shall have, in any action or suit brought against him for any act done or omitted to be done in the execution of his duty under the said Ordinance, the like protection and privileges as are by law given to a judge in the execution of his office. Upon a true construction of s. 14(1) and s. 10, the learned judge concluded that immunity is conferred on every member of the advisory board in the circumstances stated therein.

[67] It has been alluded to above that the title to the plaintiff's action and para 2 of the statement of claim against the first defendant show that the first defendant was sued in his capacity as a judge of High Court Malaya.

[68] From the facts in the instant appeal, it was clear that the first defendant was at the material time the judge heading the civil division of the Kuala Lumpur High Court in charge of, *inter alia*, all matters pertaining to execution and attachment process including writs of seizure and sale in the Kuala Lumpur area.

[69] In our judgment, judicial immunity conferred by s. 14(1) is wide enough to extend to the discharge of his duties under art. 121 and the written law. These duties include all acts and duties expected or assigned to be performed by the first defendant, both within and outside Malaysia. The instructions and orders made by the first defendant are entirely within his authority and within the limits of his jurisdiction legally conferred upon him by art. 121 and the written law, regardless of the fact that he was on leave in Singapore and outside the country. The mode and the manner including the place from which he exercised that authority (phone call from Singapore while on leave) are irrelevant.

[70] The facts and circumstances available in the court below and now in the instant appeal undoubtedly attract the application of judicial immunity under s. 14(1). The plaintiffs' purported cause of action is really an exercise in futility under O. 18 r. 19(1)(a), there being no reasonable cause of action against the first defendant, and so no vicarious liability can be attributed to the second defendant.

[71] Hence, the defendants have successfully established that the plaintiffs' statement of claim is devoid of any reasonable cause of action.

[72] Although at this juncture, the plaintiffs' statement of claim is capable of being struck out under O. 18 r. 19(1)(a), nevertheless, in order not to leave any stone unturned, we have also proceeded to consider the other provisions *viz* O. 18 r. 19(1)(b) or (d) relied on by the plaintiffs.

Scandalous, Frivolous Or Vexatious

[73] In the context of O. 18 r. 19(1)(b), "scandalous" is taken to mean wholly unnecessary and irrelevant and not just unpleasant allegations: see eg, *Boey Oi Leng v. Trans Resources Corporation Sdn. Bhd* [2002] 1 CLJ 405 HC.

[74] "Frivolous" or "vexatious" means that the pleadings are obviously unsustainable.

[75] In considering this ground, affidavit and undisputed facts may be referred to.

[76] It is singularly significant to note that the plaintiffs have failed to plead in their statement of claim the undisputed facts that:

(1) Public Bank had on 18 November 2002 obtained from the court below an interim stay on the execution of the writ of seizure and sale until the disposal of the application by Public Bank to set aside the default judgment; and

(2) Public Bank had on 24 April 2003 successfully obtained an order from the SAR setting aside the default judgment and on appeal, the registrar's order was affirmed by the judge in chambers on 22 March 2005.

[77] As early as 24 April 2003, there was no longer any judgment to entitle the plaintiffs to file the writ of seizure and sale against Public Bank.

[78] Notwithstanding the above, the plaintiffs' action against the defendants herein was filed on the basis of the writ of seizure and sale against Public Bank purportedly in execution of the default judgment. The action was filed on 14 May 2005, which was some two years after the default judgment had been set aside.

[79] The inclusion of these material and undisputed facts in the plaintiffs' statement of claim would have put the entire picture in proper perspective. That in turn would have plainly and obviously demonstrated that the plaintiffs' purported cause of action arising from the writ of seizure and sale against Public Bank was without any foundation whatsoever. To say the least, it is scandalous, frivolous or vexatious under O. 18 r. 19(1)(b), in the sense of being wholly unnecessary and irrelevant; or that it is obviously unsustainable.

[80] We therefore hold that the defendants have successfully established that the plaintiffs' action is within O. 18 r. 19(1)(b).

Abuse Of The Process

[81] The court has an inherent jurisdiction to prevent an abuse of its process: *Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd.* [1993] 3 CLJ 606 SC.

[82] Illustrations of an abuse of the process of the court include: A

(a) An intention to embarass the defendants: *Ansa Teknik (M) Sdn. Bhd v. Cygal Sdn. Bhd* [1989] 1 LNS 26; or

(b) Where the process of the court has not been used in a *bona fide* manner and has been abused: *Hadi Hassan v. Suria Records Sdn. Bhd & Ors* [2004] 8 CLJ 225. B

[83] The categories of abuse of process of the court are never closed and will certainly proliferate pursuant to the myriad of circumstances available from the factual matrix found in each particular case. C

[84] In *Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin* [1988] 1 SLR 374 at p. 384, the Singapore Court of Appeal explained the scope of "an abuse of the process of the court" under O. 18 r. 19(1)(d) which is in *pari materia* with ours. The term has been given a wide interpretation by the courts and includes considerations of public policy and the interests of justice. It signifies that the process of the court must be used *bona fide* and properly and must not be abused. On the facts before us, the defendants have established an abuse of the process of the court. D E

Conclusion

[85] The result is that the plaintiffs' appeals are wholly without merits. They are dismissed with costs. The orders of the court below are affirmed. Deposit to the defendants towards account of taxed costs. F

[86] Having heard and dismissed this appeal with costs on 18 July 2007, my learned brother Mokhtar Sidin, JCA has since retired. My learned brother Mohd Ghazali bin Mohd Yusoff, JCA has read this judgment in draft and has expressed his agreement with it. G

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